REPLY TO POINTS OF ERROR THIRTY-SIX TO FORTY-THREE

Appellant's points of error thirty-six to forty-three inclusive, read as follows:

POINT OF ERROR NO. THIRTY-SIX

Appellant was denied due process of law where the court permitted officer Mullican to testify at the trial to alleged oral statements made by appellant that were in addition to and not included in those introduced at the pre-trial hearing and/or contained in the "statements made by Wayne Henley to be offered in evidence" filed at the order of the judge who conducted the pre-trial hearing.

POINT OF ERROR NO. THIRTY-SEVEN

Appellant was denied due process of law where the State was permitted to introduce the testimony of officers Mullican and Smith regarding alledged oral confessions relating to Johnny Delone and Frank Aguirre, when these same officers had testified at the pre-trial hearing to statements regarding Mike Balch and Raymond Blackburn, and at no time mentioned either Aguirre or Delone, this change in testimony being required by physical evidence and facts discovered after the pre-trial hearing.

POINT OF ERROR NO. THIRTY-EIGHT

Appellant was denied due process of law where the State knowingly introduced testimony of officers Mullican, Smith and Young that was materially and substantially at variance with their testimony at the pre-trial hearing, particularly the trial testimony relating to Johnny Delone and Frank Aguirre.

POINT OF ERROR NO. THIRTY-NINE

The trial court committed reversible error in admitting appellant's alleged oral confessions relating to the torture of some or all of the victims, where such confessions did not comply with the requirements of Article 38.22(1)(e), V.A.C.C.P.

POINT OF ERROR NO. FORTY

The trial court committed reversible error in admitting appellant's purported oral confession relating to the "body box," State's Exhibit No.

Copied from holdings of Texas State Archives

Twenty-Six, where such confession did not comply with the requirements of Article 38.22(1)(e), V.A.C.C.P.

POINT OF ERROR NO. FORTY-ONE

The trial court committed reversible error in admitting appellant's purported oral confession relating to Frank Aguirre, where such confession did not comply with the requirements of Article 38.22 (1)(e), V.A.C.C.P.

POINT OF ERROR NO. FORTY-TWO

The trial court committed reversible error in admitting appellant's purported oral confession relating to Marty Jones, where such confessions did not comply with the requirements of Article 38.22 (1)(e), V.A.C.C.P.

POINT OF ERROR NO. FORTY-THREE

The trial court committed reversible error in admitting the testimony of Officers Mullican, Smith and Young relating to appellant's alleged oral statements regarding the details of the offenses, where such statements did not comply with the requirements of Article 38.22(1)(e), V.A.C.C.P.

At pages 193 to 233 of his brief the appellant sets forth, with considerable direct quotations from the testimony, the manner in which, in one continuous conversation with Pasadena detectives Mullican and Smith, interrupted only by incidents of travel and exhumation, and by proper interludes for the defendant to rest and eat, Defendant Elmer Wayne Henley relieved his burdened conscience (See R. 2260) by making disclosure of his acts of criminal homicide.

This conversation with Detective Mullican began at 11:00 o'clock on the morning of August 8, 1973, at the police station, Pasadena, Texas (R. 2304), and continued until the night of August 10, 1975 (R. 2472), when Mullican, Smith and appellant parted at the Pasadena Police Station.

Copied from holdings of Texas State Archives

Appellant's brief does not, as is here done, point out that this was one continuous conversation, but at the end of his forty page discussion of the facts relevant to the claims of error here asserted, he makes, at page 233 of his brief, the following admission that here there was no reversible error: as to admissibility and sufficiency of evidence.

> "It is apparent from the foregoing that the evidence was sufficient to support the jury's verdict, assuming that it was admissible and, if inadmissible, that its introduction was harmless error. [Emphasis added] (Page 233 of appellant's brief)

The State agrees that if, arguendo, there was any error here, it was harmless.

The flood of evidence of these murders makes that quite clear, Harrington v. California, 89 S.Ct. 726, 395 U.S. 250.

The State does not agree with the defendant's contention that there was any error.

Summarizing the evidence:

Pasadena uniformed Police Officer J.B. Jamison was on duty August 8, 1973, at 8:24 a.m. when he received a call to go to 2020 Lamar. He arrived there in two or three minutes, at 8:26 a.m. (R. 2241-2).

This was a Wednesday (R. 2243).

Three people were sitting on the sidewalk in front of the white frame residence at 2020 Lamar. They were Rhonda Williams, Timothy Kerley and appellant Elmer Wayne Henley (R. 2243).

Appellant was crying. Rhonda had her arms around him. Kerley was standing (R. 2244).

Copied from holdings of Texas State Archives

Appellant told the officer he had killed a man (R. 2244). The officer recovered a blue steel revolver which was lying on the sidewalk to the side and behind the three, and this is State's Exhibit No. 1 (R. 2245), admitted in evidence with any objection expressly waived (R. 2246).

The officer found the body of Dean Corll in the house (R. 2253). He then gave a "blue card warning" to the three (R. 2254), as follows (R. 2253, lines 13-24 inclusive):

> "Number one, you have the right to have a lawyer present to advise you either prior to any questioning or during any questioning.
>
> Number two, if you are unable to employ a lawyer, you have the right to have a lawyer appointed to counsel with you prior to or during any questioning.
>
> Number three, you have the right to remain silent and not make any statements at all and any statements that you make and(sic) probably will be used in evidence against you at your trial.
>
> Number four, you have the right to terminate the interview at any time."

This officer asked appellant no questions. Appellant appeared to understand the warnings and not to be "drunk or intoxicated or anything", and did not ask for a lawyer (R. 2257).

The officer picked up the firearm from the sidewalk, using a pencil through the trigger guard, and put it in the patrol car trunk (R. 2257).

Appellant, in the patrol car back seat, sobbing, "blurted out that he didn't care who knew,that he had to get it off his chest but he might know where there would be some more bodies" (R. 2260, lines 16-20).

Detective W.L. Lawrence (R. 2266) arrived at the scene

Copied from holdings of Texas State Archives

at 8:30 a.m. Detective Sergeant Dave Mullican (R. 2266) was assigned to investigate the case (R. 2267, lines 3-5). Officer Jamison took Henley, Kerley and Rhonda Williams to the station while the two detectives, Lawrence and Mullican, stayed at the scene about 15 minutes and then returned to the station about 9 a.m. (R. 2267).

At approximately 10:45 a.m. a magistrate, Municipal Court Judge Russell Drake, gave the defendant his warning (R. 2268). This was done in the detective's office (R. 2269-2270).

The officer testified as to the warning, being this (R. 2274, lines 18-25, R. 2275, lines 1-14):

> A "On this date, Elmer Wayne Henley, Jr., a white male, age seventeen, personally appeared before me in the custody of W.L. Lawrence, Detective Sergeant, Police officer, Pasadena Police Department, and I gave the said arrested person the following warning:
>
> "Elmer Wayne Henley, Jr., you have been accused in the offense of murder. You have a right to remain silent. You have a right to retain counsel. You have a right to have an attorney present during interview with peace officers or attorneys representing the State. You have a right to terminate that interview with police officers or attorneys representing the State at any time. You have a right to request appointment of counsel if you are indigent and cannot afford counsel. You have a right to have an examining trial. You are not required to make any statement and any statement you make may and probably will be used against you upon your trial.
>
> "The above statutory warning given by Judge Russell Drake, Pasadena Municipal Court, Harris Court (sic), Texas, on the 8th day of August, 1973, at 10:55 a.m." Signed Russell Drake.

Appellant appeared to be normal, calm and collected and to understand the warning.

Copied from holdings of Texas State Archives

He did not indicate that he wanted a lawyer or wanted to remain silent (R. 2275-2276).

About thirty minutes after the warning was given, appellant was turned over to Detective Sergeant Mullican (R. 2276)

Officer Jamison knew that Henley then was seventeen years old (R. 2277).

Sergeant Mullican (R. 2286, line 1) saw appellant when he arrived at the scene about 8:40-8:45 a.m. (R. 2287). Corll had been shot six times and was dead (R. 2289).

The detective saw a board in the center of the bedroom (R. 2292), as shown in the picture which is State's Exhibit Four (R. 2292), admitted with an express waiver of objections (R. 2293).

This board was about eight feet long and two and a half feet wide, plywood, with six holes drilled, at center and corners, and ropes and handcuffs attached (R. 2293). There were four pairs of handcuffs, three of which were shown in the picture (R. 2294).

There also was a bayonet, there were paper bags smelling like acrylic, and a can of acrylic spray - also some ropes (R. 2294).

A large portion of the room was covered with plastic, about a sixteenth-inch thick, and there was a roll of this plastic (R. 2295). This plastic was capable of holding liquid (R. 2297).

A photograph of Billy Lawrence was in the chest of

Copied from the holdings of the Texas State Archives

drawers (R. 2334).

In the bedroom, on the floor, there was a small toolbox. In it was a dildo - a rubber two-headed penis (R. 2297). Also in the 18-inch long toolbox was a large white suppository looking object, two glass rods about six to eight inches long, what looked like three marijuana cigarettes. There also was a torn picture that looked like it came from a driver's license (R. 2298).

There was also a bayonet (R. 2302).

A photograph of all of this was admitted with objection expressly waived (R. 2299, line 11).

In a tool shed (about 8 x 10 feet) at the 2020 Lamar premises (R. 2301), a wooden box was found.

The .22 caliber pistol which is State's Exhibit One was sent to Fred Rymer, Houston Department of Public Safety, for ballistics comparisons (R. 2303).

A photograph of Billy Lawrence was on the dresser (R. 2308), which is State's Exhibit 25 (R. 2335).

After spending about two and a half hours at the scene, Detective Mullican returned to the police department in Pasadena, where appellant told him he understood the magistrate's warning by Judge Drake (R. 2304). This was about 11 a.m. to 11:15 a.m.

Henley offered to lead (R. 2307) the officers to a boatstall at 4500 Silverbell in Houston (R. 2308). Appellant said Dean Corll had told him he had killed some boys and buried them in this warehouse or storage shed, maybe five or more (R. 2306).

Copied from the holdings of the Texas State Archives

After about 15 or 20 minutes at the Houston Police Department (R. 2310, line 2), a trip to the boat stall at 4500 Silverbell was taken at appellant's directions (R. 2311).

In the party were appellant Henley, Detective Mullican Detective Smith, Houston Police Detective Siebeneicher, and Detectives McComas and Earls (R. 2311).

Henley directed them to Boat Stall Number 11, which he said was Dean Corll's boat stall (R. 2312). With permission of the landlady they forced the lock, the tenant Corll being dead (R. 2313).

They saw in the stall a stripped car, a rake, a couple of shovels, some civil defense water cans, some sacks of lime, and a water can (R. 2314).

A diagram of the stall was introduced as State's Exhibit Seven, with objection expressly waived (R. 2315-2316). A plastic bag there contained men's clothing including a pair of brown shoes, a pair of black shoes, a blue shirt with what looked like a bird on it (R. 2316). This shirt, later marked as State's Exhibit 86 (R. 3031-3032), was identified as belonging to Charles Cobble (R. 3109), and had on it a pubic hair identical to one from appellant (R. 3015, R. 3016, R. 3030).

The plastic bag of clothing was marked as State's Exhibit 52 (R. 2754).

The blue shirt with the bird on it, and other garments in the plastic bag found at the boat stall were identified by Charles Cobble's mother as belonging to Charles or Marty Jones (R. 3109, line 4 to R. 3110, line 10) as follows:

Copied from the holdings of the Texas State Archives

Q Here. Let me take it out, here, because I want you to look at it and tell us whether or not you can recognize it. Why don't you look at all of it, before you give us an answer.

A The shirt Charles had on that day. (indicating)

Q All right. And, for the Record, you are referring to this, and this is State's Exhibit Number Eighty-Six. This is a shirt with a bird of some type on it?

A That's right.

Q And your son, Charles, had it on that day?

A Yes. And this is the pants that he was wearing. (indicating)

Q All right.

A This is his belt. (indicating)

Q You recognize the belt?

A Yes.

Q All right. Do you recognize either pair of the shoes? Let met get these shoes.

A These are Charles' shoes, right here (indicating)

Q These are Charles Cobble's shoes you recognize. Do you recognize any of the other clothing, Mrs. Cobble?

A I recognize these pants. These are Marty's pants, and his belt.(indicating)

Q Marty's pants and belt. Do you recognize the shoes, at all?

A No. I don't.

Q Did you see Marty Jones fairly frequently, and what clothes he was wearing or wore and all, like that?

A Yes. I did. And, in fact, you know, since he was living with us, and just living four apartments down, we often went to the washateria together.

Copied from the holdings of the Texas State Archives

At the boat stall, when appellant took the officers there, also was an old four by eight foot piece of plywood with canvas straps about the size of a person's wrist on it, suspended from the ceiling (R. 2316-2317).

The stall is shown by photographs, State's Exhibits 9 et seq., admitted with objection expressly waived (R. 2321), Exhibit 12 being withdrawn (R. 2322).

The digging for bodies was described thus by Detective Sergeant Mullican before the jury (R. 2323, line 4 to R. 2324, line 4):

A After I entered the boat stall with the other detectives there was an area of cracked ground approximately here in the boat stall. That was slightly humped, looked like it had possibly been dug up and the dirt refilled. And we dug there with a shovel down just a short distance and discovered a body.

Q All right, sir. Now, was there considerable digging in the boat stall that afternoon of August the 8th?

A Yes, sir; there was.

Q What, if anything, was found beneath the dirt surface there in the boat stall?

A Numerous bodies.

Q How many bodies were found?

A That evening there were eight. The evening of the 8th there were eight bodies found.

Q Eight bodies found?

A Yes, sir.

Q Were there any other bodies found in that same boat stall at a later time?

A Yes, sir.

Q And when was that?

Copied from the holdings of the Texas State Archives

A That was the following day. A total of nine more bodies found.

Q Seventeen bodies?

A Yes, sir.

Further description, using a diagram, State's Exhibit 24 (admitted at R. 2325) was given by Mullican as follows (R. 2326, line 16 to R. 2329, line 16).

About 10 p.m. to 10:30 p.m. appellant returned to the Pasadena Police Station (R. 2338).

After they left the boat stall the officers went by the house at 2020 Lamar and in the back yard (R. 2333). There a box was found (State's Exhibit 26, see R. 2337, and see references to S-26 in list of exhibits supra in this brief; note admission in evidence of S-26 with objection expressly waived at R. 2634, lines 22-24).

The next day at 9 to 9:30 a.m., the officers removed appellant from the Pasadena jail and continued their conversation with him (R. 2339).

Officer Mullican was continuously with appellant Henley from this time until around midnight on this day, Thursday, August 9, 1973 (R. 2341).

About noon on August 9, 1973, a statement by Henley was reduced to writing (R. 2342). A Jackson v. Denno hearing, the evidence in which comprises Volumes XX to XXII inclusive, was held by Judge Hatten in Houston on appellant's motion to suppress. Judge Hatten, as a result of this hearing, executed on January 31, 1974, a written instrument entitled Findings of Fact on Voluntariness and Admissibility of Oral

Copied from the holdings of the Texas State Archives

and Written Confessions. It was entered in Volume IX, page 807 of the General Minutes of the 176th District Court on January 31, 1974.

A copy of this instrument was inadvertently left out of the 30 volume record in this case.

On March 15, 1976, the undersigned assistant district attorney, James C. Brough, and Hon. Will Gray, for the defense, filed a joint motion in the 176th District Court in Harris County, Texas, requesting that the court order the clerk of his court to forward a certified copy of this finding to the District Clerk of Bexar County, which was that day ordered.

Subsequently, a joint motion by Mr. Gray for the defense and James C. Brough for the State, was filed in the 185th Judicial District Court in Bexar County, being physically presented to the court by Hon. Douglas Young, Assistant Criminal District Attorney of Bexar County, requesting that this written findings of fact be added to the record on appeal in the six cases here appealed, and this was ordered, with the order again approving the record as thus amended.

Since the writer of this brief does not at this time know precisely where this finding will be placed in the record, a Xerox copy of the copy forwarded by the Harris County District Clerk is attached hereto as Appendix A.

The evidence on appellant's statement taken in Harris County (See Vol. XX to XXII) was offered in Bexar for consideration (R. 2340), at which time the court stated as to the written statement (R. 2340, line 25 to R. 2341, line 1):

Copied from the holdings of the Texas State Archives

"THE COURT: It has already been held to be voluntary and admissible."

This referred, obviously, to the following four paragraphs at pages 8 and 9 of Judge Hatten's findings, which reads as follows:

> The written statement made August 9, 1973, to Detective D.M. Mullican, was made by Defendant Elmer Wayne Henley, Jr., freely and voluntarily, without compulsion or persuasion, and he knowingly, intelligently and voluntarily waived his rights in connection with the making and signing of said written statement. Said statement shows therein the accused at a time prior to the making thereof received from said Detective D.M. Mullican, the person to whom the statement was made, a warning that he, said Defendant, had a right to have a lawyer present to advise him either prior to or during any questioning, that if he was unable to employ a lawyer, he had a right to have a lawyer appointed to counsel with him prior to and during any questioning, that if he was unable to employ a lawyer, he had a right to have a lawyer appointed to counsel with him prior to and during any questioning, that he had a right to remain silent and not make any statement at all and that any statement he made could and probably would be used in evidence against him at his trial, and that he had a right to terminate the interview at any time.
>
> The statement also shows that a Magistrate, Judge Russell Drake, had previously given the said Defendant the warning by said Magistrate herebefore quoted in this finding of fact and law.
>
> The said statement shows therein, and the Court now finds from all the evidence at said hearing that the said Defendant knowingly, intelligently and voluntarily, without threats, fear, persuasion or any form of coercion or duress and while sane, lucid, and in command of his actions, waived the right to consult with a lawyer before he made said statement; and waived his right to remain silent and voluntarily made and signed said statement.
>
> The Court finds this written statement subject to materiality is admissible in evidence.

Copied from the holdings of the Texas State Archives

The written statement itself was introduced in evidence as Defendant's Exhibit 7 at the motion to suppress in Houston, and can be seen at R. 5427-5428.

This gave rise to some confusion at trial. The State put in evidence (R. 2349) a signed carbon copy of the written statement (R. 2347-8).

This exhibit is at R. 3293.

As can there be seen, two typed lines were superimposed on two printed lines.

As a result, a Xerox copy of the original statement (R. 2565, R. 2575) was introduced as State's Exhibit 49 (R. 2580) and can be seen at R. 3310. Each has the same deletions (R. 2572) but in Exhibit 49 the two typed lines are not superimposed on the printed lines.

The written statement, Exhibit 49, reads as follows:

> Statement of Elmer Wayne Henley, Taken at 114 Davis, Pasadena Police Dept., Harris County, Texas.
>
> On the 8th day of August, 1973, at 10:55 o'clock A.M., I, Elmer Wayne Henley, was taken before Judge Russell Drake, a Magistrate at his office Pasadena, Harris County, Harris County, Texas, who informed me:
>
> Of the accusations made against me;
> That I had a right to retain counsel;
> That I had a right to remain silent;
> That I had a right to have an attorney present during my interview with peace officer or attorneys representing the state;
> That I have a right to terminate an interview at any time;
> That I have a right to request appointment of counsel if I cannot afford counsel;
> That I have a right to an examining trial;
> That I am not required to make any statement, and any statement I make may be used against me.
>
> I have now been warned by Detective D.M. Mullican, the person to whom I am making this

Copied from the holdings of the Texas State Archives

statement, and was so warned by Detective D.M. Mullican prior to any questioning of me by police while I was under arrest:

(1) that I have the right to have a lawyer present to advise me either prior to any questioning or during any questioning; (2) that if I am unable to employ a lawyer I have the right to have a lawyer appointed to counsel with me prior to or during any questioning, and (3) I have the right to remain silent and not make any statement at all and that any statement I make may and probably will be used in evidence against me at my trial, and (4) I have the right to terminate the interview at any time.

I do not want to consult with a lawyer before I make this statement, and I do not want to remain silent, and I now freely and voluntarily waive my right to a lawyer and to remain silent and make the following voluntary statement.

My name is Elmer Wayne Henley, I am a white male 17 years old and was born on 5-9-56 in Houston, Texas. I have completed the 8th grade in school and can read and write the English Language. I presently live with my Mother at 325 West 27th Street in Houston, Texas.

About 3 years ago, I met a guy by the name of Dean Corll. Dean was a lot older than me and a school friend by the name of David Brooks introduced me to him. David was always riding around in Dean's car and everything. I was only about 14 at the time and I thought this was great. David Brooks told me that he could get me in on a deal where I could make some money, and he took me to Dean Corll. Dean told me that he belonged to an organization out of Dallas that bought and sold boys, ran whores and dope and stuff like that. Dean told me that he would pay me $200.00 at least for every boy that I could bring him and maybe more if they were real good looking boys. I didn't try to find any for him until about a year later, and I decided that I could use the money to get better things for my people so one day I went over to Dean's Apt on Schuler street and told him that I would find a boy for him. Dean had a GTX at the time, and we got in it, Dean and me and started driving around. We picked up a boy at 11th and Studewood, and I talked to him since I had long hair and all and it was easier for me to talk to him. I talked him into going to Dean's Apt so we went over to Dean's Apt. Dean left some handcuffs laying out where they could be seen, and we had this little deal

Copied from the holdings of the Texas State Archives

set up where I would put the handcuffs on and then could get out of them. Then we talked this boy (I don't remember his name) into trying to get out of them. The only thing was we put them on where the locks were turned in where he couldn't get the key into them. Then Dean took the boy down and tied his feet and put tape over his mouth. I thought Dean was going to sell him to this organization that he belonged to, so I left. Then the next day, Dean paid me $200.00. Then a day or so later I found out that dean had killed the boy. Then I found out that Dean screwed him in the ass before killing him. This was the start of the whole thing, and since then, I have helped Dean get boys, I don't remember exactly how many. Dean would screw all of them and sometimes suck them and make them suck him. Then he would kill them. I killed several of them myself with Dean's gun and helped him choke some others. Then we would take them and bury them in different places. David Brooks was with us on most of them.

I think the only three that David Brooks wasn't with us on was the last ones at the house on Lamar Street in Pasadena. The ones that I can remember by name are Charles Cobble who I killed and we buried in the boat stall. I shot Charles in the head with Dean's pistol, over on Lamar Street in Pasadena, then we buried him in the boat stall. We killed a boy by the name of Billy Lawrence, I don't remember how we killed him, but we buried him up at Dean's place on Sam Rayburn Lake. We killed him at the house on Lamar Street too.

I shot and killed Johnny Delone, and we buried him at High Island.

We choked Frank Aguirre and buried hem (sic) in the head and we buried him at Rayburn. The last one that I cna (sic) remember their name is Homer Garcia, and I shot him in the head and we buried him at Rayburn. I don't remember the dates on all these, because there has been too many of them. Some of them were hitch-hikers and I can't remember their names.

While making this statement, I have not asked for nor wanted the presence or advise of a lawyer. At no time during the making of this statement did I ask to stop or want to stop making this statement.

I have read the 2 page(s) of this statement, each page of which bears my signature, and the facts contained therein are true and correct.

Copied from the holdings of the Texas State Archives

This statement was finished at 12:40 P.M. on the 9th day of August, 1973.

Detective Mullican testified that he read to appellant the warning contained in the statement prior to taking the written statement (R. 2343) which began at 11:55 a.m. (R. 2345-6). This warning, he testified, was as follows (R. 2345, lines 13-20):

> A That he had a right to retain counsel, a right to remain silent, and a right to have an attorney present during an interview with any peace officers or attorneys representing the State, a right to terminate the interview at any time, the right to request appointment of a counsel if he could not afford counsel, a right to an Examining Trial and he was not required to make any statement and any statement he made could be used in evidence against him.

The officer typed up the statement as appellant gave it to him, and then appellant spent five minutes reading it over and then signed it in Sergeant Mullican's presence (R. 2346).

Detective Sergeant Nassif and Lieutenant Goad signed as witnesses (R. 2347).

Appellant did not at any time request a lawyer or say he did not want to discuss the case (R. 2348). He was not in any way coerced into making the statement (R. 2356).

Exhibit 28 was read to the jury (R. 2351), the reading there conforming to Exhibit 49, above quoted.

Detective Mullican testified, as to the information related to him by Henley, as follows (R. 2356, line 22 to R. 2357, line 14; R. 2358, lines 20-25:

> Q And, at the time the statement was actually given as to how these persons actually met

Copied from the holdings of the Texas State Archives

their death, whether it was strangling or shooting or however, did you have any idea how any of them were killed, prior to any of the reports of the medical examiner?

A No, sir; I didn't.

Q And, at the time, did you have any idea where any of them were buried, other than the ones that had been -- that he had referred to that had been found in the boathouse?

A No, sir.

Q Not idea where, but the specific location at that time?

A No, sir; I didn't.

Q And, prior to this time, did you know where any -- prior to his telling you that there were some bodies up around Lake Sam Rayburn, did you have any idea that there were any bodies buried up there?

A No, sir; I had no idea.

* * * * *

A He told me that he would willingly guide me to Lake Sam Rayburn area where these other bodies were buried. And, if necessary, on to High Island where there were additional bodies buried.

Q Well, shortly thereafter did you leave and go to Sam Rayburn?

A Yes, sir.

The officers, with Henley, left the Pasadena police station around 2:30 p.m. They got to the Houston Police Department about 3 p.m. and left there about 3:30 p.m. (R. 2359).

After the ride from the Houston Police Department to Sam Rayburn had begun, appellant told Detective Mullican a number of things.

He said he thought Billy Lawrence was buried near Lake Sam Rayburn and when they got to the area near Lake Rayburn to which appellant guided

Copied from the holdings of the Texas State Archives

them, appellant said, "Slow down. I think this is where Billy Lawrence is buried." (R. 2360)

Appellant said he never worried about being stopped by a highway patrolman while taking bodies to the Sam Rayburn and High Island areas because they were carried in a body box - the same Detective Mullican had seen in Dean Corll's shed [State's Exhibit 26] (R. 2361)(The box was found to contain human hair identical to that of Charles Cobble (R. 3029) as well as hair identical to that of appellant Henley, in State's Exhibit 50, R. 2685, R. 3016, R. 3027, and see R. 2336, R. 2634 and R. 3008).

In this same conversation appellant, with Detectives Mullican and Sid Smith present, as well as Houston Detective Willy Young (R. 2415-6), told about the handcuffs and their use (R. 2416-7).

He said Dean Corll bought most of them at pawn shops (R. 2417). Henley would trick the victims into willingly being handcuffed (R. 2417).

Henley would put handcuffs on behind him and then get out of them [he kept a key in his back pocket (R. 2419)] and then get the victim to put them on and see if he could get out of them. The victim could not get out of them (R. 2417).

Then, usually, Henley and Corll would take the victim down and attach him to the board (R. 2418).

An example he gave was Frank Aguirre (R. 2419-2420).

Henley had known Frank Aguirre quite a while and Frank had gone with Rhonda Williams (R. 2420), who was handcuffed to the board, with Timothy Kerley at the time that Henley rescued them by killing Corll.

After Henley tricked Aguirre into the handcuffs, Corll

Copied from the holdings of the Texas State Archives

"had his fun" with him (R. 2421), meaning oral and rectal sodomy (R. 2422), and then Henley killed and buried him (R. 2421).

On the same trip Henley told about choking Marty Jones with a piece of rope as follows (R. 2422, line 25 to R. 2423, line 12):

> THE WITNESS: Wayne was telling me about choking Marty Jones with a piece of rope and he said, "It's not easy to choke somebody and kill them like it shows on TV." He said, "You have to choke them like this, real strong, and it's hard to kill them. They won't hardly die." He said, "When I killed -- when we killed Marty Jones, I had to get Dean to come in and help me. (indicating)"
>
> BY MR. VANCE:
>
> Q Was he demonstrating his hands like you were?
>
> A Yes, sir. He demonstrated that he couldn't-- he had a hard time choking him.

On this trip he also told of difficulties at Lake Sam Rayburn, of burial (R. 2423-4).

They took a piece of rug to put loose dirt on, to keep it from being around, and a hand and part of an arm of one body came up, so they had to put a piece of board over the bodies (R. 2424).

On the same trip he told where the roll of plastic found at the Corll house was gotten from Baylor Medical College where Dean's father worked (R. 2426).

Detective Mullivan then testified that Dean's father told him he did work for the Medical College (R. 2427).

At the outset appellant had said he could lead Sergeant Mullican to where bodies were buried and that he knew where they were buried because he had helped bury several of

Copied from the holdings of the Texas State Archives

these bodies (R. 2362).

The car containing appellant met some officers at Lufkin and others further down the highway in San Augustine County near St. Augustine about a two-hour drive northeast of Houston - over a hundred miles (R. 2362).

To get to the location of the bodies, Sergeant Mullican made turns from one road to another at Wayne Henley's direction (R. 2362-2363).

The bodies were buried in a heavily wooded area in a national forest - no house or buildings around...a dirt and gravel road (R. 2363).

Two bodies were recovered the night of August 9, close to Lake Rayburn. They were probably a hundred yards apart (R. 2365).

One of these bodies appellant told Detective Mullican was Billy Wayne Lawrence (R. 2365). The other he said he thought was Homer Garcia (R. 2366). Appellant said he helped bury them (R. 2366). Appellant used a big log as a landmark (R. 2367).

These bodies were wrapped in plastic and had lime on them (R. 2367).

Around 10:30 to 11 p.m. they went to the San Augustine County jail and checked Henley in there (R. 2367).

About 6:30 a.m. on the morning of Friday, August 10, Detective Mullican checked Henley out of the jail at St. Augustine, and he directed them to two more gravesites, which were about half-way between the locations of the other two

Copied from the holdings of the Texas State Archives

bodies (R. 2368).

Appellant said he believed one was Homer Garcia (R. 2369)

The two of them were buried in the same hole (R. 2369)

Appellant and the officers then went to High Island (R. 2370), which is on the end of Bolivar Peninsula, and about eighteen miles from Houston twenty miles from Galvestion (R. 2371). It took about an hour and a half to drive there from Lake Sam Rayburn (R. 2371, R. 2428).

Appellant told the officers there were several bodies buried at the High Island Beach, some of which he had helped bury (R. 2372). He had said he shot and killed Johnny Delone (sic) and choked Frank Aguirre and buried them at High Island (R. 2373).

Appellant and the officers stopped at a cafe for a sandwich and coke (R. 2428), leaving there about 12:30 to 1 p.m. (R. 2428).

At the beach they met Houston Detective Tucker and Detective Hammel and co-defendant David Brooks, as well as Sheriff's officers from Jefferson, Galveston and Chambers Counties (R. 2429).

Three counties meet on this long deserted beach (R. 2429).

They took a black top road that Henley said led to the beach (R. 2431).

Henley and Brooks talked together a few moments near a large rock on the beach and then Henley told Detective

Copied from the holdings of the Texas State Archives

Mullican he thought there was a body buried by the rock (R. 2433).

He said several other bodies were scattered up and down the beach, probably five or six, along in the same line with this rock (R. 2434). On both August 8 and 9, he had said he thought Johnny Delone (sic) and Frank Aguirre were burried at High Island (R. 2439).

About 1 p.m. Friday, August 10, 1973, they started digging at High Island (R. 2441). They found one body near the rock. Thirty or forty minutes later they found another seventy-five or a hundred yards down the beach (R. 2442) at a place Henley led them to, saying, "Dig here" (R. 2445), "I think there is one here. I can smell it" (R. 2446).

They left High Island about 3:45 p.m., August 10, 1973, and returned to Pasadena (R. 2450).

The same conversation which led to the later recovery of the bodies of Frank Aguirre and Johnny Delome was continued on the way back from High Island to Pasadena (R. 2451).

They left the High Island beach and went at once to a nearby filling station where the conversation was continued (R. 3182).

During this conversation, appellant told about several ways the victims were tortured prior to being killed (R. 2452)

He said Billy Lawrence was kept about three days (R. 2452), chained or handcuffed to the board, because Corll liked him particularly (R. 2453).

Henley said he and Corll had used the rubber dildo on Lawrence and all the other victims (R. 2453).

Copied from the holdings of the Texas State Archives

His words were that they had "shoved it up their butt" (R. 2454).

They had pulled pubic hair out, one at a time, and shoved glass rods about the size of a sickroom thermometer up their penises (R. 2454).

They also shoved into the rectums a large porcelain bulled-shaped instrument, which was found with the dildo (R. 2455). It is about ten inches long and an inch and a half in diameter (R. 2455).

They boys were handcuffed to the board, sometimes to a wall, with their mouths taped to they couldn't make any noise while this was done (R. 2456).

They would be split-eagled, face down on the board in a loose manner so they could be turned on their side but couldn't move off the board (R. 2457).

The board used was the one previously found at the Corll residence (R. 2457).

In the same conversation appellant said he had himself killed Charles Cobble, Marty Jones and Billy Lawrence (R. 2458). He said he shot Charles Cobble in the right temple and choked Marty Jones within a short time the same day (R. 2459).

If there was more than one victim, one was put on each side of the board (R. 2460), the board flat on the floor, each victim having his hands fastened to one end of the board and his feet fastened to the other, so they lay partly on their sides and partly on their stomachs (R. 2461).

Copied from the holdings of the Texas State Archives

In this same conversation appellant told the officers that Cobble and Jones had been the two bodies that were tied together, found at the boat stall on the night of the 8th (R. 2468).

In this same conversation appellant said he killed Homer Garcia (R. 2479) by shooting him in the left temple in the house at 2020 Lamar (R. 2483, R. 2387).

He said (as of August 10) it had been about two weeks since he killed Cobble and Jones and about four weeks since he killed Garcia (R. 2483).

He also said Billy Lawrence was killed there (R. 2486).

He said he had killed Billy Lawrence about two months before August 10, 1973 (R. 2489).

When the officers and Henley got back to Pasadena on the night of August 10, 1973, the officers turned Henley over to the jail personnel (R. 2490).

He had never told Detective Mullican he wanted a lawyer or said anything to the effect that he wanted to remain silent (R. 2490). Detective Mullican never saw Henley mistreated in any way on these three days (R. 2490). Henley never made any complaints in Detective Mullican's presence (R. 2491). Henley was never threatened to have him make a statement (R. 2491-2). He was never promised anything (R. 2492). He appeared to be sober and rational (R. 2493).

Clearly, on this tour of body recovery, at appellant's direction, he gave the officers much information which proved to be true and conduced to show his guilt as is required in

Copied from the holdings of the Texas State Archives

Art. 38.22 for admissibility of an oral statement.

The tour was continuous, the conversation that was voluntarily carried on by appellant was a continuing thing, and every relevant thing he said during this conversation was admissible under Art. 38.22 C.C.P.

Thus, not only was the evidence so extensive and overwhelming that, as appellant concedes at page 233 of his brief, any error of admissibility was harmless, but there simply was no error.

Appellant attempts to establish a violation of his constitutional rights in that some additional details were recalled by the police officers after they first testified at the motion to suppress.

He attempts to make these details into additional and new oral statements. This simply is not correct. There were no multiple statements. There was one continuing statement, and if there were more than one, they clearly break down into statements before leaving for San Augustine County, on the way there, while there recovering bodies, statements made in connection with recovery of bodies at High Island, and on the way back to Pasadena from High Island, all of which statements were ruled voluntary by Judge Hatten in his written findings, which are in the record and are shown at Appendix A of this brief.

Dr. Joseph Jachimczyk, Chief Harris County Medical Examiner, testified (R. 2768 et seq.) as did Dr. Jack Pruitt (R. 2939 et seq.). They performed autopsies on the victims.

A chart showing some of the testimony is presented

Copied from the holdings of the Texas State Archives

above, and for convenience is here reproduced:

Copied from the holdings of the Texas State Archives

Autopsy Testimony Summary

Record Page	Victim's Name	Date Died	Where Body Recovered	Harris County Medical Examiner Body No.	Cause of Death
R.2817 R.2815 R.2809) R.2802) R.2801-2	Homer Garcia	July 18,1973	San Augustine	73-3377	Left head & Chest Gunshot Wounds
R.2817 R.2818 R.2824 R.2834	Frank Aguirre	Feb.24,1972	High Island	73-3409	Strangulation & Gag
R.2835 R.2842 R.2837 R.2839	Johnny Delone	May 21,1972	High Island	73-3412	Gunshot-head and strangle & Gag
R.2959 R.2801 R.2941 R. 2959 R.2959 R.2941	William Ray Lawrence	Dead one month prior to Aug.10, 1973	Lake Rayburn San Augustine		Strangled
R.2784 R.2773 R.2787 R.2772 R.2774	Charles Cobble	2 weeks before Aug. 9, 1973	4500 Silverbell	73-3335	2 Gunshot wounds of head
R.2789 R.2789 R.2799 R.2794 R.2790	Marty Jones	2 weeks before Aug. 9, 1973	4500 Silverbell	73-3334	Strangulation

Copied from the holdings of the Texas State Archives

(CONTINUES CONVERSATION)

Appellant engaged, on August 8, 9, and 10 of 1973, in a continuing conversation with Detective Mullican as to location of bodies, including the victims in the six cases at bar.

The bodies of these victims were recovered as a result of what appellant told this detective and Detective Smith.

Two of them, Charles Cobble and Marty Jones, came from the boat shed at 4500 Silver Bell.

Two of them, Billy Lawrence and Homer Garcia, were recovered by appellant's directions in the continuing conversation near Lake Sam Rayburn.

Two of them, Frank Aguirre and Johnny Delome, were recovered at High Island, as a result of directions given by appellant during this continuing conversation.

Article 38.22 C.C.P. is completely met, so that the rule of harmless error which appellant concedes would apply, is not required.

(PORTIONS SELF-SUFFICIENT-NO SURPRISE)

This would be true even were the conversation broken up into bits. Each portion brought forth additional information which proved to be true and conduced to show appellant's guilt.

Appellant takes the incorrect position, at page 238 of his brief, that it was a denial of fundamental fairness and due process to permit testimony as to oral confession "not previously mentioned by them."

This would imply surprise, but there was no surprise.

It is his theory, apparently, that after a list was prepared, giving the general nature of statements by appellant,

Copied from the holdings of the Texas State Archives

which the State expected to be used, for use at the motion to suppress, on orders of the court, the State must thereafter be strictly limited to the detail proved up by the defense.

For example, appellant makes complaint (page 209 of his brief) as follows:

> "It should be noted at this point that neither the testimony of Mullican nor Smith, nor the supplemental offense report nor the State's list of 'statements made by Wayne Henley to be offered in evidence' contained any reference to either Frank Aguirre or Johnny Delome.
>
> "The two 'surplus' bodies referred to by the officers prior to their testimony at the trial, were purportedly those of Mike Balch and the boy from Baton Rouge (Raymond Blackburn.)
>
> "The alleged atrocities were committed 'on some of the boys' but there were no details relating any specific atrocity to any of the victims in the case on trial. Both Smith and Mullican later added the choking of Marty Jones to their testimony even though their previous testimony, offense reports and statement of evidence contained no such specific reference."

The inference naturally drawn from this presentation is that the State laid behind the log on this evidence, to surprise appellant at trial, thus depriving him of a fair trial, and there simply is no truth to any such suggestion.

At the motion to suppress, Defendant's Exhibit 7, at R. 5427-8, had all these statements by appellant in it, as follows R. 5428):

> "Then Marty Jones, me and Dean choked him and buried him in the boat stall. . . I shot and killed Johnny Delone, and we buried him at High Island. . . We choked Mark Scott and Frank Aguirre and buried them at High Island."

Clearly, appellant's claims do not go to fundamental fairness and due process, but are a diligent effort by appointed counsel to find error where none exists.

Copied from the holdings of the Texas State Archives

ORAL STATEMENT FROM HIGH ISLAND TO PASADENA

The oral statement which was listed as Number 10 in the finding of facts by Judge Hatten, and there held voluntary, is clearly admissible as being in compliance with requirements of Art. 38.22 C.C.P., for three individually sufficient reasons.

First, this was part of a continuous conversation which appellant had with Detective Mullican and Detective Smith, extending from August 8, 1973, until the evening of August 10, 1973, which conversation led to the recovery of the bodies of the six victims in the six cases at bar. All relevant statements therein are admissible under Art. 38.22 C.C.P.

Second, if the parts of this continuing conversation are to be considered as divided, the record shows this portion actually occurred at High Island, near the beach, as a continuation of the portion of conversation resulting in recovery of bodies there (two later recovered there from directions of appellant and David Brooks being Frank Aguirre and Johnny Delome). This is shown at R. 3181, line 10 to 14, R. 3182, lines 4 to 24, R. 3186, lines 2-23 and R. 3187, lines 4 to 8 and 18 to 23, as follows:

> "Q State whether or not any bodies were recovered on the 10th of August, 1973, that Friday, as a result of the directions of both, David Brooks and Dean Henley, all in Dean Henley's presence. I mean, Wayne Henley, all in Wayne Henley's presence. (R. 3181, lines 10-14.
>
> "A Yes. We discovered two bodies while I was there.
>
> "Q And what time did you leave High Island to return to Pasadena with the Defendant, Wayne Henley?

Copied from the holdings of the Texas State Archives

"A It was about 4:00 o'clock in the afternoon.

"Q Now, as a part of this same conversation that led to these bodies in High Island, and immediately after leaving there, and in route to Pasadena, what, if anything, did the Defendant. Wayne Henley, tell you concerning the manner in which any of these victims had met their death?

Mr. Gray: We object to this, Your Honor, any oral statement made by the Defendant while under arrest.

The Court: Overruled.

Mr. Gray: Note our exception.

By Mr. Vance:

"A We stopped at a service station there at High Island and --

"Q Was this the first thing that you did?

"A Yes, sir. Immediately upon leaving the beach we drove to a service station and we stopped and I asked Henley to name all the individuals that were killed at the house at 2020 Lamar in Pasadena. (R. 3182, line 4 to line 24).

"Q In the same conversation at High Island, after the afternoon of August the 10th, 1973, what, if anything, did the defendant, Wayne Henley, say, concerning how Homer Garcia had met his death? (R. 3186, line 20 to line 23).

THE WITNESS: He said that Homer Garcia was also killed at the house, at 2020 Lamar, in Pasadena. And he thought he was buried at Sam Rayburn, and he said that he shot Homer Garcia in the head. He believed in the left temple. (R. 3187, lines 4 to 8) (Emphasis added).

"Q As to this particular conversation that you had when you stopped at this filling station, immediately after leaving the High Island grave-site, did you make notes on these matters, have an opportunity to make notes on these matters, at that time?

"A Yes, sir. I did." (R. 3187, line 18 to 23).

Copied from the holdings of the Texas State Archives

Clearly this was part of the specific portion of conversation at High Island resulting in the later recovery there of the bodies of Johnny Delone and Frank Aguirre, and thus is admissible under Art. 38.22 C.C.P.

Third, if this portion of conversation, which occurred after the car bearing appellant and Detectives Mullican and Smith left the beach, is to be segregated and considered all alone, it still qualifies under the oral confession requirements of Art. 38.22 C.C.P.

The above underlined portion of appellant's statement, to which Detective Smith testified at R. 3187, disclosed that Homer Garcia was shot in the left temple.

This is a statement made at approximately 4:15 p.m. on the afternoon of August 10, 1973, as the above quotations show.

Two hours and forty-five minutes before this, according to proof made by appellant's counsel in his cross examination of Dr. Jachimzcyk (R. 2871) an autopsy was performed on the body of Homer Garcia at San Augustine by Dr. Pruitt. The result was that Doctor Pruitt formally found a combination of strangulation and suffocation was cause of Homer Garcia's death (R. 2871). This is consistent with Dr. Pruitt's testimony (R. 2939-2942).

Thus, at the very time this statement was made by appellant at 4:15 p.m., giving a precise description of the cause of Homer Garcia's death (shot in the left temple) an incorrect conclusion as to these facts--later shown to be in error--had been reached in an official autopsy report.

Copied from the holdings of the Texas State Archives

Appellant, in his written confession, had said he shot Homer Garcia in the head but not where in the head. The written confession was made prior to the autopsy by Dr. Pruitt.

Thus, this statement by appellant in this specific portion of the conversation, disclosed for the first time where in the head Homer Garcia was shot, and again disclosed -- contrary to the then official finding -- that Garcia's death was by gunshot.

The day after this portion of the conversation occurred, at 1:00 p.m., August 11, 1973, three bodies including that of Homer Garcia were received from San Augustine by Dr. Joseph Jachimczyk, Chief Harris County Medical Examiner (R. 2801).

Dr. Jachimczyk did not perform an autopsy on Homer Garcia, his body number 73-3377, until 9:45 a.m., August 15, 1973 (R. 2802). This was five days after the conversation in which appellant disclosed that he shot Homer Garcia in the left temple.

Dr. Jachimczyk, when he performed the autopsy, proved the statement that Garcia was shot in the left temple, made by appellant to Detectives Smith and Mullican, to be true. He found two gunshot entrance wounds on the left side of the head, as well as one in the left chest (R. 2802). He recovered two mushroomed .22 bullets from Garcia's head and one (not mushroomed) from the left back (R. 2803).

These bullets were in State's Exhibit 42 (R. 2803).

This Exhibit was marked at R. 2495, connected to body

Copied from the holdings of the Texas State Archives

number 73-3377 at R. 2804, admitted at R. 2850.

Fred Rymer, firearms expert (R. 2982) testified as to State's Exhibit 42 (R. 2930) with the name "Garcia" on it (R. 2994, lines 21-22). He concluded from his tests that these three bullets were fired from State's Exhibit No. 1 (R. 2995). State's Exhibit No. 1 is the pistol recovered from the sidewalk beside appellant at 2020 Lamar on August 8, 1973, and admitted at R. 2246 with any objection expressly waived (R. 2246).

The customary manner of stating the rule as to showing compliance with the oral confession statute is to say that the defendant disclosed facts not previously known by officers and that the information led to discovery of evidence which conduced to establish the defendant's guilt. This, however, is not essential .

In Rhodes v. State, 262 S.W. 753 at 754, this peculiarly Texas rule, which then substituted even for voluntariness, was explained as follows:

> "The law seeks truth, and primarily rejects unwarned or involuntary or induced statements of those in custody, because of the danger to truth resulting from such situation; but when such statements lead to the discovery of facts establishing guilt, or when such statements then unknown to be true are verified by subsequent discovery of guilty facts showing them to be true they are admissible."

This alternative means of satisfying the special requirement of the Texas statute as to oral confessions continues, although voluntariness and warning now also are required.

In Nelson v. State, 21 S.W.2d 1045, the confession was

Copied from the holdings of the Texas State Archives

admissible although a co-defendant made the disclosure before the defendant did. In Williams v. State, 28 S. W. 2d 233, the body of deceased had been discovered before defendant dislcosed its whereabouts. The "true" test was stated in the Williams case, supra, where by the facts discovered the statement of the defendant was verified. In that instance this was done by finding a pool of blood with some chips over it.

In Wilson v. State, 473 S.W. 2d 532, information as to where a stolen car was left was held sufficient to make an oral confession admissibe, although another officer had already found the car and impounded it.

In the case at bar we have a statement by the defendant that he shot the deceased Garcia in the head, the left temple, he believed. This statement was made when examination of the already recovered body of Garcia had led a pathologist to a contrary conclusion and formal finding. This statement by the defendant was later verified by a second pathologist.

There can be no doubt under these circumstances that the statement made by appellant as to shooting Homer Garcia in the left temple complies with the statute, in conformity with the above cited cases.

Also see Chase v. State, 508 S.W.2d 605; Smith v. State, 514 S.W. 2d 749; and McGilvery v. State, 533 S.W.2d 24.

Thus, for any of three reasons, this portion of the conversation was admissible in evidence under Article 38.22 C.C.P.

Copied from the holdings of the Texas State Archives

Further, as appellant admits at page 233 of his brief, if it were not admissible, any error would be harmless. Sirls v. State, 511 S.W.2d 55; Harrington v. California, 89 S.Ct. 726, 395 U.S. 250; Rogers v. State 468 S.W.2d 438.

Appellant's points of error thirty-six to forty-three inclusive are without merit.

Copied from the holdings of the Texas State Archives

REPLY TO POINTS OF ERROR FORTY-FOUR AND FORTY-FIVE

Appellant's Points of Error Forty-Four and Forty-Five read as follows (page 240 of his brief):

POINT OF ERROR NO. FORTY-FOUR

> "Appellant's oral and written confessions were involuntary under the totality of the circumstances and their use against him violated his right to due process, guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

POINT OF ERROR NO. FORTY-FIVE

> "Appellant's oral and written confessions were obtained in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States because he was denied the assistance of counsel."

In short, appellant now claims his statements were not voluntary and that he was denied the assistance of counsel.

At page 263 of his brief he cites McCandless v. State 425 S.W.2d 636 at 640, and correctly quotes the following from that opinion by now Presiding Judge Onion:

> "Miranda, of course, teaches that a heavy burden rests upon the prosecution to prove that a person in custody 'knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' 384 U.S. at 475, 86 S.Ct. at 1628."

In that case, in which the conviction was affirmed, there was a written waiver as to retained counsel but no written waiver as to the right to appointed counsel, and Judge Onion wrote (425 S.W.2d 636 at 640-641 [points 4-8]:

> [4] Such statements in a confession are factors to be considered in determining if the accused affirmatively waived his rights,

Copied from the holdings of the Texas State Archives

but it is not determinative thereof. See this writer's concurring opinion in Torres v. State, Tex. Cr. App., 422 S.W.2d 741.

"Just as the mere signing of a boiler-plate statement to the effect that a defendant is knowingly waiving his rights will not discharge the government's burden, so the mere absence of such a statement will not preclude as a matter of law the possibility of an effective waiver." United States v. Hayer, 385 F.2d 375.

[5,6] While there is no written waiver as to the right to appointed counsel, we observe that at the time of his arrest it was shown that appellant was employed and owned a 1963 Chevrolet station wagon and no claim is made that appellant was indigent at that time, though some six months later the court did appoint him counsel. See Footnote 43, Miranda. In State v. Gray, 268 N.C. 69,150 S.E.2d 1, it was held that inasmuch as there was nothing to show that the defendant was indigent at the time of his arrest and interrogation, the failure of the police officers to advise him of the right of an indigent to have counsel appointed did not violate the defendant's constitutional rights against self-incrimination and would not render any statements he made to officers inadmissible. See also Commonwealth v. Wilbur, 2 Cr.L.R. 2271.

[7] Likewise, it would logically follow that if an accused not shown to be indigent at the time, is fully warned as to his rights to the appointment of counsel if destitute, but informed as well of his right to appointed counsel if he "was unable to obtain counsel," then the failure to show a waiver of his right to appointed counsel does not deprive him of his constitutional rights or render any statement made inadmissible.

At the time of the confession the appellant was a 55-year-old man with a high school education who had taken a business course by correspondence. While it appears he followed the construction trade as a carpenter most of his adult life, the record shows he also worked as a motel manager in various parts of the United States. It further appears that before appellant signed the statement in the presence of five witnesses, he made and initialed nineteen corrections on said statement. While appellant could not recall making the statement, it is noted that while testifying on the

Copied from the holdings of the Texas State Archives

motion to suppress as to the corrections made on the written statement he pointed out to the District Attorney that he was a better speller than the prosecutor.

We find nothing in the record that would support a finding that this appellant was threatened, tricked, or cajoled into a waiver. There does not appear to be any question of physical or psychological coercion. While the exact length of the interrogation is not shown, the record supports the conclusion that it was concluded Sunday morning, July 31, 1966, following the double set of warnings. There is further no showing of incommunicado incarceration which would mitigate against the finding of a valid waiver.

[8] While the "waiver" was not here demonstrated by the prosecution in the most effective or desirable manner, we feel when the "totality of the circumstances" are considered the evidence is sufficient to show that the state has discharged its burden and the appellant made a constitutionally permissible waiver as required by Miranda.

The trial judge overruled the motion to suppress and found the written confession voluntary.

McCandless, supra, has been cited and followed in a number of cases. A recent example is Harris v. State, 516 S.W.2d 931 at 937, which was affirmed in an opinion by Judge Roberts, with a concurring opinion by Judge Onion, who cited the McCandless opinion and finds there was a constitutionally permissible waiver of counsel. In the Harris case, the defendant asked to talk to counsel and the questioning was stopped. Later the appellant initiated the conversation which led to the confession.

Judge Onion, 516 S.W.2d 931 at 937, wrote:

"When the 'totality of the circumstances' is considered, I conclude that the evidence is sufficient to show the state discharged

Copied from the holdings of the Texas State Archives

its burden and the appellant made a constitutionally permissible waiver as required by Miranda."

In the case at bar it is patent that when the totality of the circumstances is considered, appellant's written and oral statements are voluntary, and made with constitutionally permissible waiver as required by Miranda.

In the first place, a close reading of the entire 30 volume record makes it clear that if appellant had not had a terrific inner force and compulsion to ease his conscience by making disclosure as to the horrible crimes in which he had participated, he might very well be physically free today.

No one was questioning him or even had him in mind as a possible suspect - or even had in mind that the series of crimes had been committed - when appellant (R. 2260)

> ". . .blurted out that he said that he didn't care who knew that he had to get it off his chest but he might know where there would be some more bodies." [Emphasis added]

Prior to this, Pasadena Police Officer Jamison had given appellant, Timothy Kerley and Rhonda Fleming (R. 2253-4) the blue card warning (R. 2254) which appellant appeared to understand. Appellant appeared to understand the warning, did not appear intoxicated, did not request a lawyer and did not say he wanted to remain silent (R. 2256).

The "blue card" warning which was read to appellant by Officer Jamison is as follows (R. 2255, lines 13-24 inclusive):

> A Number one, you have the right to have a lawyer present to advise you either prior to any questioning or during any questioning.

Copied from the holdings of the Texas State Archives

Number two, if you are unable to employ a lawyer, you have the right to have a lawyer appointed to counsel with you prior to or during any questioning.

Number three, you have the right to remain silent and not make any statements at all and any statements that you make (sic) and probably will be used in evidence against you at your trial.

Number four, you have the right to terminate the interview at any time.

Patently, here, there is no question of appellant being early informed of his right to have a lawyer appointed to counsel with him prior to or during any questioning.

It was just a few moments after this that appellant "blurted" his first disclosure.

Officer Jamison, to whom appellant made that statement, never asked him a single question that morning (R. 2256, lines 8-9).

This occurred about 8:30 a.m. (R. 2243).

Later that morning, before any questioning of appellant, a magistrate, City Judge Russell Drake, gave the appellant another warning of his rights, as follows (R. 2274, line 18 to R. 2275, line 14):

A "On this date, Elmer Wayne Henley, Jr., a white male, age seventeen, personally appeared before me in the custody of W.L. Lawrence, Detective Sergeant, Police Officer, Pasadena Police Department, and I gave the said arrested person the following warning:

"Elmer Wayne Henley, Jr., you have been accused in the offense of murder. You have a right to remain silent. You have a right to retain counsel. You have a right to have an attorney present during interview with peace officers or attorneys representing the State. You have a right to terminate that interview

Copied from the holdings of the Texas State Archives

with police officers or attorneys representing the State at any time. You have a right to request appointment of counsel if you are indigent and cannot afford counsel. You have a right to have an examining trial. You are not required to make any statement and any statement you make may and probably will be used against you upon your trial.

"The above statutory warning given by Judge Russell Drake, Pasadena Municipal Court, Harris County, Texas, on the 8th day of August, 1973, at 10:55 a.m." Signed Russell Drake.

Later appellant told Detective Mullican he understood Judge Drake's warning (R. 2304). He did not request the aid of a lawyer. There was a brief conversation in which appellant volunteered to take Detective Mullican to the boat shed for recovery of some bodies which appellant then said Dean Corll had told appellant about (R. 2306-7).

Next morning, after the recovery of bodies at the boat stall was well underway, appellant was again warned (R. 2345, line 11 to R. 2346, line 5) as follows:

A That he had a right to retain counsel, a right to remain silent, and a right to have an attorney present during an interview with any peace officers or attorneys representing the State, a right to terminate the interview at any time, the right to request appointment of a counsel if he could not afford counsel, a right to an Examining Trial and he was not required to make any statement and any statement he made could be used in evidence against him.

Q And you gave him that warning?

A Yes, sir.

Q At approximately what time did you give him this legal warning on August the 9th?

A This statement was taken at 11:55 A.M. It was begun at that time, on August the 9th.

Q And you warned him prior to reducing the state-

Copied from the holdings of the Texas State Archives

ment to writing?

A Yes, sir.

Thereafter, appellant made his written statement which, inter alia, shows at its beginning and end, the following (R. 2351, line 12 to R. 2352, line 23; R. 2355, lines 12-19):

> "11:55 A.M. Elmer Wayne Henley. Taken at the Pasadena Police Department, Harris County, Texas, the 8th of August, 1973. At 10:55. Elmer Wayne Henley, at (sic) o'clock was taken (sic) Judge Russell Drake, at Pasadena, Harris County, Texas, at his office, who informed me of the accusations made against me, that I had a right to retain counsel, I had the right to remain silent, I had the right to have an attorney present during my interview with peace officers or attorneys present during my interview with peace officers or attorneys representing the State, that I had a right to terminate an interview at any time, I had the right to request appointment of counsel if I can not afford counsel. I have the right to an Examining Trial, I am not required to make any statement and any statement I make may be used against me. I have now been warned by Detective D.M. Mullican, the person to whom I am making this statement, was so warned by Detective Mullican prior to any questioning by police while I was under arrest: one I have the right to have a lawyer present to advise me either prior to any questioning or during any questioning. Two, if I am unable to hire a lawyer, I have the right to have a lawyer appointed to counsel with me, prior to or during any questioning. Three, I have the right to remain silent and not make any statement at all; that any statement I make may be and probably will be used against me at my trial; and,four, I have the right to terminate the interview at any time.
>
> I do not want to consult with a lawyer before I make this statement. I do not want to remain silent and do now freely and voluntarily waive my right to a lawyer and remain silent and make the voluntary statement.
>
> My name is Elmer Wayne Henley. I am a white male, seventeen years old, was born on 5-9-56, in

Copied from the holdings of the Texas State Archives

Houston, Texas. I have completed the eighth grade in school and can read and write the English language. I presently live with my mother at 325 West 27th Street, in Houston, Texas.

* * * * *

While making this statement, I have not asked for nor wanted the presence or advise (sic) of a lawyer. At no time during the making of this statement did I ask to stop or want to stop making this statement.

I have read the 2 page(s) of this statement, each page of which bears my signature, and the facts contained there in are true and correct. This statement was finished at 12:40 P.M. on the 9th day of August , 19 73.

These facts were also proved before the court at the motion to suppress evidence; the original statement by appellant, containing the warning and recitation of waiver, there being in evidence as Defendant's Exhibit 7 at R. 5427-8.

After this statement in writing was made, appellant offered to "willingly guide" (R. 2358) Detective Mullican to the Lake Sam Rayburn area (where the bodies of Billy Lawrence and Homer Garcia were recovered by reason of his directions) and High Island (where, as a result of instructions by appellant and David Brooks, the bodies of Frank Aguirre Delone were recovered).

This he did.

At the motion to suppress, appellant took the stand and, on cross-examination, testified (R. 5363, lines 20-23) as follows:

> Q None of these officers ever used any physical abuse against you? Did they hit you, strike you, anything of that nature?

Copied from the holdings of the Texas State Archives

A None that I know of or recall.

Appellant testified that he signed the written confession (R. 5326-7).

He testified (R. 5328, lines 4 to 8) as follows:

Q Would you look this over, the contents of it, and read it, please, to yourself.

That's the statement you made to Detective Mullican, isn't it?

A Well, it would appear so.

Appellant testified at R. 5334, line 4 to R. 5335, line 5, as follows:

Q (By Mr. Vance) Well, you stated a while ago that Detective Mullican wanted you to read this and you took it and you scanned over it at that time. In other words, you read it rapidly; isn't that a fair statement?

A No, sir. Scanned and read rapidly are two different things.

Q Well, what did you do, just scan it past you then or just try to play like you were reading it so Mullican wouldn't be upset with you for not reading it to see if it was correct?

A I couldn't go into that, what I did at that time.

Q You don't remember; is this one of the times you don't remember?

A I didn't read that word for word as far as I can recall.

Q You went over it and saw the general substance of it at that time, didn't you, as to what was in it when you scanned it? You did that, didn't you?

A I guess so.

Q All right. And you saw this warning up at the top that had been given to you by Detective

Copied from the holdings of the Texas State Archives

Mullican and again recited in this exhibit, didn't you?

A I saw the warning at the top.

As appellant's brief notes, at page 260 thereof, he was belligerent on cross-examination, at the motion to suppress. But he did make reluctant admissions.

He there stated, for example, at R. 5337, lines 13 to 20:

Q (By Mr. Vance) But you don't remember the uniformed officer giving you a warning; you don't remember Detective Mullican giving you a warning; you don't remember Judge Renfro giving you a warning and you don't remember Judge Drake giving you a warning; is that your testimony?

A That is my testimony.

Appellant testified, at R. 5340, lines 15 to 25:

Q (By Mr. Vance) How did the officers discover the bodies the night of the 9th by Lake Sam Rayburn?

A They dug for them.

Q How did they know where to dig?

A Somebody told them.

Q Who told them?

A I'd assume I did.

Q Well, do you remember, or is this one of the times you blacked out and you can't recall?

A I don't remember running through the brushes.

Appellant testified at R. 5345, lines 2 to 9:

Q You don't recall the warning at all from Judge Renfro at the start of the morning of the 10th?

A No, sir. I don't recall it.

Q But you do recall the ham and eggs and eating

Copied from the holdings of the Texas State Archives

a pretty good sized breakfast the morning of the 10th?

A They made a big to-do over it.

Appellant testified at R. 5346, line 11 to R. 5349, line 7, as follows:

Q I believe you kept saying over and over on direct examination that every chance you got you told these officers you wanted to call your mother and they kept putting you off on this. Is that a fair statement?

A That's a fair statement of it, I guess.

Q But you called and talked to your mother on the night of the 8th or evening of the 8th. She visited you the morning of the 9th. You called her and talked to her about 2:30 p.m. on the 9th. And you called her later that night from the jail in San Augustine. Actually, you saw her one time and make two other separate phone calls to her on the 9th of August, didn't you?

A Well, would you like to start off from the very beginning and take those one by one?

Q You saw her on the 9th and made two telephone calls to her on August 9th?

A That isn't the first one you mentioned.

Q Huh?

A That isn't the first one you mentioned.

Q Well, did you call her on the evening of the 8th?

A Yes, sir. I believe so.

Q Did you see her on the morning of the 9th?

A Not that I can recall.

Q But you don't know why she would come in here and make that up. Is there any reason why she would come in here and make up a story and the jail people make up jail records about your having seen her for fifteen minutes on the morning of the 9th?

Copied from the holdings of the Texas State Archives

MR. GRAY: We object to that, Your Honor. It calls for a conclusion on the part of this witness.

THE COURT: Sustained.

Q (By Mr. Vance) Okay. So you don't remember her coming to visit you on the morning of the 9th. Do you remember calling her around 2:30 the afternoon of the 9th prior to going from the Pasadena Police Department to the Houston Police Department?

A Yes, sir.

Q Do you remember having called her and talked to her again that night from San Augustine, being allowed to use the phone, call her and talk to her at that time?

A I remember that I did get to call her.

Q So your answer to that question is yes; isn't that correct?

A No, sir. My answer was I remember I did get to call her.

Q Well, you talked to her on the night of the 9th, didn't you?

A Are you telling me that or asking me that?

Q I am asking you that.

A Well, I guess so, since I --

MR. VANCE: Your Honor, could this witness be instructed to answer the questions rather than engage in these arguments.

THE COURT: Try to answer the question.

THE WITNESS: Well, all right.

Q (By Mr. Vance) Did you call your mother on the night of the 9th from San Augustine County?

A I recall that I did, yes, sir.

Q You called her again on the 10th, didn't you and again saw her the night of August 10th; isn't that correct?

A I believe so.

Copied from the holdings of the Texas State Archives

Detective Mullican testified at the motion to suppress (R. 5380 et seq.) and contrary to appellant's claim at page 261 of his brief, it was not a general denial but specific denials of appellant's claims.

At R. 5380, lines 13 to R. 5383, line 6, Detective Mullican testified:

> Q All right. Detective Mullican do you ever recall the Defendant, Wayne Henley, complaining of any ailments of any kind other than the time he asked to see a doctor up in San Augustine County jail on the night of the 9th of August?
>
> A The only time that he complained of any ailments, he told me that at times all this stuff he had bottled up in him made him feel like his chest was tight and that sometimes he thought he might be going to have a heart attack.
>
> Q All right. Now, when do you recall him specifically mentioning that he felt tight in the chest? How many occasions?
>
> A Well, he didn't --
>
> Q How many occasions, first of all.
>
> A Only this first occasion, and he was referring to not at that particular time but some time in the past that he had felt like that.
>
> Q All right. Now, when was that in reference to --
>
> A That was on the morning of the 9th.
>
> Q Was that during the time that the written statement was being taken or immediately before that?
>
> A It was prior to the written statement being taken at the time he was making his oral statement.
>
> Q All right. Now, did he say that he felt that way at that particular time, or what was the context of the conversation?
>
> A No, sir. After he had begun to tell me about these things, he said that in the past having

Copied from the holdings of the Texas State Archives

this bottled up in him he had felt like sometimes it bothered him so bad that he felt like he might be going to have a heart attack.

Q So he was talking about in the past he had felt so bad about all this that he thought he might have a heart attack?

A Yes, sir.

Q Did he complain of having chest pains or constriction or anything in his chest that morning at that time?

A No, sir, not at that time.

Q Did you say anything to him with regard to this condition that he had had in the past?

A Yes, sir. I told him that having that type of information bottled up inside him that I wasn't surprised that he felt like that.

Q Did you ever tell him that it would be your opinion that he would have a heart attack if he didn't give a statement or anything of that nature?

A No, sir.

Q Do you recall any other times that he brought up the matter of having any pains in his chest or going to have a heart attack, either he felt that way at that time or felt this way in the past?

A No, sir. That's the only time that I recall it being brought up.

Q So, in other words, as to any present physical ailments that he might be under, what, if any, times did he complain about feeling bad in any way?

A The only time that he complained of feeling bad was at San Augustine County at which time he was furnished a doctor.

At R. 5384, lines 3 to 25, Detective Mullican testified:

Q Did you ever make any threats to him of any

Copied from the holdings of the Texas State Archives

kind?

A No, sir, none whatsoever.

Q Did you ever make any statement like, "If you don't give us a statement or if you don't get this off your chest, I am going to take you over to the Houston Police Department and they are going to give you a lie detector test and they are going to grill you or they will question you or make inquiries about this thing until you do give a statement"? Did you ever say anything anywhere similar to that?

A No, sir, nothing at all similar to that.

Q Did you ever tell Wayne Henley that he did not need a lawyer at any time?

A No, sir.

Q And I believe you stated before at no time did he ever ask you to let him have a lawyer or that he wanted to have a lawyer down there; is that correct?

A No, sir. He was allowed to make any phone calls that he wished to call an attorney. He never requested an attorney and was refused.

At R. 5385, line 12 to R. 5386, line 20, Detective Mullican testified:

Q Incidentally, was he given cigarettes at times when he would want to smoke?

A Yes, sir. He was furnished cigarettes the whole time.

Q Did he smoke very frequently?

A Yes, sir, quite a bit.

Q About how much?

A At least a pack a day.

Q Did he smoke his own cigarettes or other people's or both?

A The first day there was a package of cigarettes that belonged to Lieutenant Goad in the office. He smoked those the first day. Then after that,

Copied from the holdings of the Texas State Archives

myself and Detective Smith bought cigarettes for him.

Q Did you ever take away his cigarettes after you bought them from him?

A No, sir. The only time that he wasn't allowed to have cigarettes was when he was confined in the actual cell. That's a rule of the police department.

Q Of the department?

A Yes, sir.

Q He never complained of any asthmatic attacks or conditions or chest conditions while he was smoking all those cigarettes?

A No, sir.

Q Did you ever hear anybody threaten Mr. Henley in your presence on the 8th, 9th or 10th of August?

A No, sir, nobody at all.

MR. VANCE: That's all we have, Your Honor.

MR. GRAY: No questions.

The court, in the finding of fact which is Appendix A hereof, and has been ordered added to the record on appeal by Judge Dial on joint request of State and appellant, found the statements were voluntary, and that appellant made a voluntary, knowing and intelligent waiver of his right to have a lawyer present.

The State readily agrees that McCandless v. State, 425 S.W.2d 636, states law here applicable and simply submits that under the totality of the circumstances in this case, the appellant's confessions, written and oral, were voluntary, and he made a constitutionally permissible waiver.

Copied from the holdings of the Texas State Archives

Further, as appellant recognized at page 233 of his brief (but under these points does not), if any part of the evidence in this case was inadmissible, it would be harmless error.

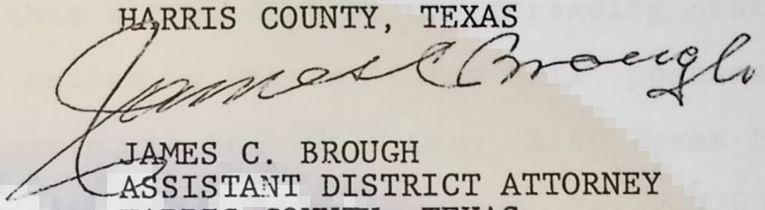
Points of Error Forty-Four and Forty-Five are without merit.

These six convictions should be affirmed.

Copied from the holdings of the Texas State Archives

Respectfully submitted,

CAROL S. VANCE
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS



JAMES C. BROUGH
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

DON LAMBRIGHT
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

LUCIEN CAMPBELL
ASSISTANT CRIMINAL DISTRICT ATTORNEY
BEXAR COUNTY, TEXAS

DOUGLAS C. YOUNG
ASSISTANT CRIMINAL DISTRICT ATTORNEY
BEXAR COUNTY, TEXAS

COUNSEL FOR APPELLEE

Copied from the holdings of the Texas State Archives

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing State's Appellate Brief was mailed by United States Mail, postage pre-paid and affixed thereto, to Hon. Will Gray, 1140 Texas Bank and Trust Building, 6161 Savoy Drive, Houston, Texas 77036, counsel for appellant, on this, the 7th day of May, A.D., 1976.

JAMES C. BROUGH
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS
500 CRIMINAL COURTS BUILDING
301 SAN JACINTO STREET
HOUSTON, TEXAS 77002
(713) 228-8311, Ext. 7216

Copied from the holdings of the Texas State Archives

Appendix A

CAUSE NO. 198,892

THE STATE OF TEXAS : IN THE 176TH DISTRICT COURT

VS. :

ELMER WAYNE HENLEY, JR. : OF HARRIS COUNTY, T E X A S

FINDINGS OF FACT ON VOLUNTARINESS AND
ADMISSIBILITY OF ORAL AND WRITTEN CONFESSIONS

On the 14th day of January, 1974, came to be heard, pre-trial, the Defendant's motion to suppress oral and written statements of the Defendant, Elmer Wayne Henley, Jr.

On inquiry by the Court, as to what statements by the Defendant the State intended to offer into evidence, and on request by the Court that response to this inquiry be made in writing, the District Attorney presented to the Court and to counsel for the Defense, the following list:

STATEMENTS MADE BY WAYNE HENLEY
TO BE OFFERED IN EVIDENCE

1. Oral statement made to Timothy Kerley; approximate time 8:00 a.m., August 8, 1973; location 2020 Lamar, Pasadena, Texas.

General Nature of Statement:

Wayne Henley stated to Timothy Kerley, prior to the arrival of the Pasadena police at the Corll house, that he, Henley, had killed four or five persons in the past. Henley further stated that he had killed before, and that he could have gotten fifteen hundred dollars for Timothy Kerley as a murder victim (made around midnight August 7, 1973).

2. Oral statement made to Pasadena Police Officer J. B. Jamison; approximate time 8:30 a.m., August 8, 1973; location 2020 Lamar, Pasadena, Texas.

General Nature of Statement:

Wayne Henley told Officer Jamison, the first Pasadena police officer to arrive on the scene at the Corll residence that he, Henley, had to get it off his chest, that is the fact that Corll had told him of some bodies that were buried in a boat stall. Henley further told Jamison that the pistol, which was recovered from the scene, was the same pistol that he had shot Corll with.

3. Oral statement made to Detective D. Mullican; approximate time 1:00 p.m., August 8, 1973; location Pasadena Police Department.

General Nature of Statement:

Wayne Henley stated to Detective

Mullican that Dean Corll had told him about a warehouse that he had over on Hiram Clarke where he had killed some boys and buried them after he had had sex with them. Wayne Henley did not know how many boys were buried there but he knew the location of the boat stall and was willing to take officers to the location of the boat stall where the bodies were buried. He described the boat stall as well as the contents of the boat stall. Wayne Henley specifically named David Hilligiest, Charles Cobble and Marty Jones as being among the deceased at that location.

4. Written statement made to Detective Mullican; approximate time 12:40 p.m., August 9, 1973; location Pasadena Police Department.

Statement in evidence.

5. Oral statement made to Detective Mullican, Detective Sid Smith, Detective Willie Young; approximate time 4:00 p.m., August 9, 1973; location somewhere between Houston and San Augustine, Texas.

General Nature of Statement:

Detective Mullican asked Wayne Henley what would have happened had they been stopped by a highway patrolman or a police officer for speeding or some traffic violation and the officer looked in the van and discovered a body. Wayne Henley's reply was that they would not have seen a body as the body would have been concealed in a body box that Dean Corll had built specifically for the purpose of transporting bodies from the place where they were killed to the place where they were buried. At that time he described the body box to Detective Mullican, stating its location. Subsequently the box was recovered and hair samples were recovered from the box belonging to Wayne Henley and the victim in this cause, Charles Cobble.

6. Oral statement made to Detectives Mullican, Smith, Young, Paulk, Porter and Baker; approximate time 6:30 p.m., August 9, 1973; location San Augustine National Forest, approximately four to five miles from Broaddus, Texas.

General Nature of Statement:

Wayne Henley led officers to a location in the San Augustine National Forest on a dirt road where he pointed out two locations where bodies were buried. Officers went to those locations. Digging operations began; two bodies were recovered where Wayne Henley directed officers to dig.

7. Oral statement made to Detectives Smith, Mullican, Young, Paulk, Porter and Baker; approximate time 7:00 to 8:00 a.m., August 10, 1973; location San Augustine National Forest, approximately four to five miles from Broaddus, Texas.

General Nature of Statement:

Wayne Henley directed officers to the same general location where the first two bodies were found in San Augustine National Forest. At that time he located two additional graves for officers. Digging operations began; two more bodies were discovered. Digging operations ceased at approximately 9:30 to 10:00 that morning.

8. Oral statement made to Detective Mullican, Detective Smith, Detective Young, Detective Paulk, Detective

Porter and Detective Baker; approximate time 1:30 to 2:00 p.m., August 10, 1973; location High Island Beach.

General Nature of Statement:

Wayne Henley and David Brooks together agreed and attempted to locate bodies buried on that beach of victims killed by Henley, Corll and Brooks. Henley and Brooks together located a large rock on the beach, stating to officers that a body was buried under the rock. Digging operations began and a body was recovered from beneath the rock.

9. Oral statement made to Detective Mullican, Detective Smith, Detective Young, Detective Baker, Detective Paulk, Detective Porter; approximate time 3:00 to 4:00 p.m., August 10, 1973; location High Island Beach.

General Nature of Statement:

Both Henley and Brooks stated to these officers that there were a number of bodies located on this beach, that they could not pinpoint the exact location of each grave; but they did point out an area some three miles long on the beach within which they stated bodies were buried. This would have been in Chambers County and Jefferson County, beginning at the Galveston County line, at which time officers had heavy equipment and machinery moved in to complete the digging operations. As a result, five more bodies were located.

10. Oral statement made to Detective Mullican and Detective Smith; approximate time somewhere between 4:00 and 6:00 p.m., August 10, 1973; location between High Island Beach and the Pasadean Police Department.

General Nature of Statement:

Detectives Mullican and Smith left High Island Beach with Henley still in custody at about 4:15 p.m. on 8-10-73, enroute back to Pasadena. During this trip which lasted about one hour and fifteen minutes, Mullican and Smith talked to Henley about specific incidents in which he had personally participated and which had occurred at the house on Lamar in Pasadena. Henley stated that he had personally killed or assisted in killing (1) Billy Lawrence and Brooks assisted in killing him (2) Charles Cobble (3) Marty Jones (4) Homer Garcia (5) Mike Balch (6) the boy from Baton Rouge. Henley went on to say that he remembered burial sites as follows: Lawrence at the Sam Rayburn site, Cobble and Jones buried together at the boat stall, Homer Garcia and Mike Balch buried together at the Sam Rayburn area, and the boy from Baton Rouge buried at Rayburn area. Henley says that Cobble was shot by him in the head, Jones was choked by him and Corll, Garcia was shot by Henley, Balch was choked by Henley and Brooks and that he could not remember how they killed the boy from Louisiana. He went on to say that Brooks was present and assisted in most of the killings and helped to bury all of them. At this time Henley also related to Officers Mullican and Smith details of atrocities committed on some of the boys. He said that he and Brooks and Corll would pull their public hair out slowly, shove glass rods up their penis, and that they castrated some of them. Henley particularly remembered Billy Lawrence, saying that they had kept him three or four days because they liked him. Henley further stated that most all of the victims were beaten severely by Corll, and they (Corll, Brooks and Henley) used the rubber artificial penis which was seized as evidence from the house on Lamar was used to put in the rectum of most of

the victims. Also, Henley remarked that it was not easy to choke a person to death like it is shown on T.V. He said that it was hard to do and took a long time for a person to die when he was choking them, and that he had to get Corll or Brooks to help him on most of the choking victims.

The above list does not include statements by the Defendant relevant to the voluntary nature and admissibility of the Defendant's written and oral statements, if same becomes a jury issue.

Thereafter, to this list was added the affidavit purportedly made by Defendant Elmer Wayne Henley, Jr., on August 8, 1973, relating substantially the same facts encompassed in the oral statement which is the third item in the above list.

From January 14, 1974, until and including January 25, 1974, pre-trial, in open court; with the court reporter present, the District Attorney present, the Defendant present and with his counsel of choice, Hon. Will Gray at all times present; his counsel of choice, Hon. Edward Pegelow, present most of the time; and his counsel of choice, Hon. Charles Melder, present part of the time, and with no request by the Defendant at any time for any delay by reason of absence of any attorney from the courtroom, and with Defendant's express personally stated willingness to go forward with said attorney Charles Melder absent, the Court heard evidence adduced before the Court bearing upon the facts and circumstances surrounding the arrest of said Defendant and the prior and subsequent making of the alleged oral and written statements.

At the conclusion of said hearing, the Court having observed the manner and demeanor of the witnesses, and without regard to the truth or falsity or materiality of the content of any of said statements, and with no determination here made as to compliance of said oral statements with Article 38.22 (3)(E) of the Code of Criminal Procedure of Texas, and the Court having in no way limited the evidentiary offerings and arguments of the Defendant at said hearings, the Court now finds from the evidence, beyond a reasonable doubt, as a matter of law, that subject to a determination of materiality, and, as

to oral statements made after arrest, subject to a finding of compliance with Article 38.22 (1)(E) of the Code of Criminal Procedure of Texas, each of the statements included in the above list submitted by the District Attorney as well as the said affidavit given by Defendant on August 8, 1973, which is State's Exhibit No. 4 at the above noted hearing, is admissible in evidence, each having been voluntarily made by the Defendant, and Defendant having received the benefit of all applicable constitutional rights.

During said hearing, said affidavit purportedly made by Defendant on August 8, 1973, was used by said District Attorney in cross examining said Defendant, Elmer Wayne Henley, Jr., but the Court here expressly states that no consideration was given by the Court to questions and answers given when said affidavit was so employed; and the Court disregarded said testimony in making the herein findings of fact and law.

In support of the Court's action, the Court now states the following findings of fact beyond a reasonable doubt made prior to the above finding of law:

The oral statements which are listed as No. 1 in the above list submitted by said District Attorney were made voluntarily, at a time when the Defendant was not in custody, was not detained and was not under any form of restraint, and they were made when no peace officer was present. The Court finds that Article 38.22 of the Code of Criminal Procedure and the decision of the United States Supreme Court in Miranda v. Arizona, is not applicable to these statements and these statements subject to materiality when offered are admissible in evidence.

The oral statement which is listed as No. 2 in the above list submitted by said District Attorney was volunteered by said Defendant to Pasadena Police Officer J. B. Jamison. It is a statement made voluntarily, and spontaneously, but while said Defendant was lucid and aware

of his actions, and is res gestae of the arrest, and subject to its materiality when offered is admissible in evidence.

Further, such statement was made after the said officer read to said Defendant the following warning:

1. You have the right to have a lawyer present to advise you either prior to any questioning or during any questioning.

2. If you are unable to employ a lawyer, you have the right to have a lawyer appointed to counsel with you prior to or during any questioning, and

3. You have the right to remain silent and not make any statement at all and, that any statement you make may and probably will be used in evidence against you at your trial.

4. You have the right to terminate the interview at any time.

Prior to making the said statement, said Defendant made a voluntary, knowing and intelligent waiver of his right to have a lawyer present during the making of the statement, to his right to remain silent, and to his right to terminate said interview, and was aware that said statement could and probably would be used against him. He was aware that he could have a lawyer appointed to represent him if he was indigent, and voluntarily, knowingly and intelligently waived his right.

Prior to the making of all other oral and written statements which are listed as No. 3 et. seg. in the above list submitted by said District Attorney, Pasadena City Judge Russell Lee Drake at approximately 10:50 a.m., August 8, 1973, at the Pasadena police station in Pasadena, Texas, warned said Defendant, Elmer Wayne Henley, Jr., that he was under detention for investigation which might lead to a formal charge of murder against him, and gave him the following warning:

"You have a right to retain counsel, you have a right to remain silent, you have a right to have an attorney present during any interview with peace officers or attorneys representing the State, you have a right to terminate an interview with peace officers or attorneys representing the State at any time, you have a right to request the appointment of counsel if you are indigent and cannot afford counsel, and you have a right to have an examining trial."

"You are not required to make any statement and any statement you make may and probably will be used against you on your trial."

At the time of the giving of each of the statements listed as No. 3 to No. 10, enclosed in the above list submitted by the District Attorney, and the affidavit which said Defendant signed August 8, 1973, said Defendant Elmer Wayne Henley, Jr., was seventeen years of age, had completed the eighth grade, had passed a high school graduation equivalency test given by United States Navy recruiters, was in good health, in good physical condition, of sound mind and was aware of what he was doing when he imparted said information given in each of said statements, and when he signed each of said written instruments to wit, said affidavit dated August 8, 1973, and said written statements made to Detective D. Mullican, dated August 9, 1973.

At no time relevant to the making of the oral and written statements herein noted did the said Defendant, Elmer Wayne Henley, Jr., complain of any exhaustion, hunger or thirst.

Each of said statements was made by said Defendant, Elmer Wayne Henley, Jr., freely and voluntarily without compulsion or persuasion, and he knowingly, intelligently and voluntarily waived his right to an examining trial, his right to have a lawyer present to advise him either prior to or during any questioning, his right to have a lawyer appointed to counsel with him prior to and during any questioning, his right to remain silent and not make any statement at all and in the full realization that any statements he made could and probably would be used against him at his trial.

At no time from his arrest until time of trial did said Defendant, Elmer Wayne Henley, Jr., complain to any police officer, judge, sheriff, deputy sheriff, doctor, clinical psychologist or psychiatrist, or any other person or authority, that he was suffering hallucinations, or that he had been abused, mistreated, forced, threatened, coerced

or promised anything to make or sign any of said statements, and he freely and voluntarily stated at various times during this period that he was being well treated by law enforcement officers who had him in custody.

The Court makes these further specific findings as to the statements:

The affidavit made by Defendant Elmer Wayne Henley, Jr., on August 8, 1973, was made after he had received the above noted warnings by said Judge Drake, and after he had freely and voluntarily, without compulsion or persuasion, knowingly, intelligently and voluntarily waived his rights in connection with the making and signing thereof, and the same was voluntarily and without persuasion or compulsion, signed by said Defendant. Said affidavit is a written statement made in compliance with the voluntariness requirements of Article 38.22 of the Code of Criminal Procedure of Texas and the holdings of the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966).

However, said affidavit does not therein show that the accused has at some time prior to the making thereof received from the person to whom the statement is made, or from the magistrate, the warning statutorily required, and is, not as a written statement admissible, for any purpose, including impeachment.

The oral statement made by Defendant to Detective Mullican on August 8, 1973, which led to the making of said affidavit, is, however, in all things admissible, subject to materiality and a showing of compliance with Article 38.22 (1)(E) of the Code of Criminal Procedure.

The written statement made August 9, 1973, to Detective D. M. Mullican, was made by Defendant Elmer Wayne Henley, Jr., freely and voluntarily, without compulsion or persuasion, and he knowingly, intelligently and voluntarily waived his rights in connection with the making and signing of said written statement. Said statement shows therein the

accused at a time prior to the making thereof received from said Detective D. M. Mullican, the person to whom the statement was made, a warning that he, said Defendant, had a right to have a lawyer present to advise him either prior to or during any questioning, that if he was unable to employ a lawyer, he had a right to have a lawyer appointed to counsel with him prior to and during any questioning, that if he was unable to employ a lawyer, he had a right to have a lawyer appointed to counsel with him prior to and during any questioning, that he had a right to remain silent and not make any statement at all and that any statement he made could and probably would be used in evidence against him at his trial, and that he had a right to terminate the interview at any time.

The statement also shows that a Magistrate, Judge Russell Drake, had previously given the said Defendant the warning by said Magistrate herebefore quoted in this finding of fact and law.

The said statement shows therein, and the Court now finds from all the evidence at said hearing that the said Defendant knowingly, intelligently and voluntarily, without threats, fear, persuasion or any form of coercion or duress and while sane, lucid, and in command of his actions, waived the right to consult with a lawyer before he made said statement; and waived the right to remain silent and voluntarily made and signed said statement.

The Court finds this written statement subject to materiality is admissible in evidence.

Entered this 31st day of January, 1974.

William M. Hatten, Judge
176th District Court
Harris County, Texas

REPRODUCED FROM THE
HOLDINGS OF THE
TEXAS STATE ARCHIVES

ENTERED IN VOL. 9 PAGE 807 OF THE General

REPRODUCED FROM THE
HOLDINGS OF THE
TEXAS STATE ARCHIVES

THE CONSPIRACY ARCHIVES

STATE OF TEXAS
COUNTY OF HARRIS

I, Ray Hardy, District Clerk of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, as appears of record in Vol. 9, Page 807, Minutes of said court on file in my office.

Witness my official hand and seal of office, this February 11 1974

RAY HARDY, DISTRICT CLERK
Harris County, Texas

REPRODUCED FROM THE
HOLDINGS OF THE
TEXAS STATE ARCHIVES

STATE OF TEXAS
COUNTY OF HARRIS

I, Ray Hardy, District Clerk of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of ~~the original record~~ a certified copy, now in my lawful custody and possession, as appears of record in Vol. [illegible], Minutes of said court on file in my office.

Witness my official hand and seal of office, this [illegible]

RAY HARDY, DISTRICT CLERK
Harris County, Texas